IN THE

Supreme Court of the United States

OCTOBER TERM, 1972.

No. 72-822

THE RENEGOTIATION BOARD,

Petitioner,

vs.

BANNERCRAFT CLOTHING COMPANY, INC.; ASTRO COMMUNICATION LABORATORY, A DIVISION OF AIKEN INDUSTRIES, INC.; DAVID B. LILLY CO., INC.,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR SEARS, ROEBUCK AND CO. AS AMICUS CURIAE

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INTEREST OF THE AMICUS CURIAE

The interest of Sears, Roebuck and Co. arises from its petition for certiorari now pending before the Court in *Sears, Roebuck and Co.* v. *National Labor Relations Board,* No. 72-1503. In the instant case, this Court will decide whether a federal district court ever has jurisdiction to enjoin an administrative proceeding where an agency fails to promptly produce information under the Freedom of Information Act, 5 U. S. C. § 552 (hereafter the "Act"). An integral part of this significant question—the threshold standard for irreparable injury which merits issuance of such an injunction—is presented in *Sears.*

Accordingly, Sears moved the Court to postpone oral argument in the instant matter in order to enable joint consideration of the two cases. Although the Court denied that motion, Sears was afforded status as an *amicus curiae*.

SUMMARY OF ARGUMENT

This brief, rather than reiterate the arguments already made by Respondents, is initially addressed to discussing the relationship between the availability of the equitable remedy in dispute and the three principal concerns confronting Congress during the drafting of the Information Act. *First*, as the Government concedes (Br., pp. 12-14), Congress desired to insure that, instead of being used as authority to refuse disclosure, as had the predecessor provision of the Administrative Procedure Act, the Information Act would require "that all documents must be disclosed except those mentioned in specific, narrowly drawn exceptions." 466 F. 2d at 353 (Pet. A. 15). *Second*, Congress recognized that effective disclosure has an additional, temporal dimension. Therefore, to assure that the disclosure would be of "practical value" (S. Rep. No. 1219, 88th Congress, 2d Sess. (1964), p. 7) (hereafter "S. Rep. No. 1219"), Congress required not only disclosure, but *prompt* disclosure. The Government, while it has not disputed the inclusion of promptness in the Congressional scheme, has failed to explain how that mandate can be otherwise enforced without resort to equitable relief. *Third*, in light of the constitutional defenses raised uniformly by the various agencies during the Congressional hearings,[1] it is evident that Congress wished to make its contrary position "clear that district courts shall have [this] power" (S. Rep. No. 1219, p. 7) to force the executive branch to

1. See, e.g., Hearing before a Subcommittee of the House Committee On Government Operations on Federal Public Records Law, 89th Cong. 1st Sess. (March-April, 1965), pp. 6-15, 22-24, 57, 60, 66, 103-105, 108 and 207 (hereafter referred to as "Hearings, 89th Cong. (1965)"), and n. 9 at p. 7, *infra*.

produce documents and to "punish for contempt" executive officers should they fail to conform to its orders. 5 U. S. C. 552(a)(3). It is, *inter alia*, the government's failure now to recognize this traditional confrontation between the branches of the federal government that was at the forefront during the early formulation of the Information Act, that accounts, in part at least, for its misconstruction of the Information Act.

ARGUMENT

1. Integral to the scheme of disclosure contemplated by the Information Act is the Congressional mandate "that production [of public documents by the agencies] be 'prompt.'" *National Cable Television Assn.* v. *F. C. C.*, 479 F. 2d 183, 188, n. 11 (D. C. Cir. 1973). "[I]nformation sought by plaintiffs from the government is likely to be a perishable commodity. . . ."[2] The emphasis on "prompt" production—not simply production—is a clear recognition that expedition of disclosure is necessary to prevent "substantive damage to [a] plaintiff['s] case." H. R. Report No. 92-1419, p. 74. Accordingly, as the court below concluded, ". . . temporary stays of pending administrative proceedings may be necessary on occasion to enforce the policy of Freedom of Information Act. . . ." 466 F. 2d at 354 (Pet. A. 16). That power, included within an express delegation by Congress to "issue writs necessary or appropriate in aid of [its] jurisdiction" (28 U. S. C. § 1651), is a basic judicial tool. The very core of this well-established ancillary jurisdiction is the power to maintain the *status quo* pending the completion of litigation when equity so requires.[3] Nowhere in the Act, or in its legisla-

2. Administration of the Freedom of Information Act, Twenty-First Report by the Committee on Government Operations, H. R. Report No. 92-1419, 92nd Cong., 2nd Sess. (1972), p. 74 (hereafter "H. R. Report No. 92-1419").

3. See the discussion by the court below at 466 F. 2d at 352-4 (Pet. A14-16), and also *Murray* v. *Kunzig*, 462 F. 2d 871 (D. C. Cir. 1972), *pet. for cert. granted sub. nom. Kunzig* v. *Murray*, No. 72-403; and *Sandra Drew* v. *Liberty Mutual Insurance Co.*, ... F. 2d . . . ., 5 EPD ¶ 8652 (5th Cir., June 4, 1973), *pet. for cert. pend. sub nom. Liberty Mutual Insurance Co.* v. *Sandra Drew*, No. 73-312, in which the Fifth and District of Columbia Circuits both disregarded legislative histories precluding judicial intrusion. The crucial rationale was that in both instances, as here, the courts were only maintaining the *status quo* without altering agency decisional processes.

tive history, is there any indication that Congress intended to restrict traditional ancillary jurisdiction. Such a withdrawal of power can not, as the Government contends, be "inferred merely because Congress failed specifically to repeat the general grant of auxiliary power to the Federal courts." *Scripps-Howard Radio, Inc.* v. *F. C. C.*, 316 U. S. 4, 11 (1942); *F. T. C.* v. *Deans Foods Co.*, 384 U. S. 597, 609 (1966).[4]

2. The government's effort to construe the Act as limiting judicial, rather than executive, power is not new. The history of the Information Act, in fact of the entire Administrative Procedure Act,[5] is a continuing story of efforts by the executive branch to evade judicial regulation. See, e.g., *Abbott Laboratories* v. *Gardner*, 387 U. S. 136 (1961). From the very inception of the Act, administrative agencies have opposed its passage and implementation. Indeed, "[d]uring the hearings on bills which became the [Information Act], no witnesses testifying for government agencies supported the legislation". H. R. Rep. No. 92-1419, p. 20. The government's present effort to emasculate the effectiveness of the Information Act is thus a continuation of both its original opposition to the legislation and the subsequent, prevalent agency attitude of uniformly resisting all requests for information. *Vaughn* v. *Rosen*, ... U. S. App. D. C. ...., ... F. 2d .... (No. 73-1039, Aug. 20, 1973)[6] In short, through delaying disclosure until

4. To deviate from this rule of construction would have mischievous effects on the entire scheme of judicial administration. See *Virginia Petroleum Job Ass'n* v. *Federal Power Commission*, 259 F. 2d 921, 924 (D. C. Cir. 1958), where the court, including the present Chief Justice, relied on this rule of construction to stay agency proceedings pending appeal.

5. The Information Act (P. L. 89-487, 80 Stat. 250 (1966)) was codified in 5 U. S. C. § 522, substantially revising Section 3, the public information section, of the Administrative Procedure Act, 5 U. S. C. (1964 ed.) 1002.

6. One Congressional committee enumerated thusly the "roadblocks" created by the government (H. R. Report, No. 92-1419, p. 20):

[Continued on next page]

the immediate need that motivated a request for information has passed, agencies discourage those with the "greatest interest in obtaining disclosure" (*Id.* at p. 8), and, therefore, the greatest incentive to expend time and money to establish public, as well as private, rights under the Act.

3. The government's position is that, since the legislative history of the substantive disclosure provision of the Information Act "reflects the congressional purpose of 'providing a workable formula which encompasses, balances, and protects all interests' " (Gov't br., p. 15), a limitation on the judicial power to enforce the Act must be inferred from Congressional silence. Such a contention is specious. The target of the Act, with its "narrowly delineated" (*E. P. A.* v. *Mink*, 93 S. Ct. 827, 837 (1973)) exemptions and the allocation of the burden of proof on the defendant agencies (*Vaughn* v. *Rosen, supra*) was, unmistakedly, the historical abuses of the executive department, not the judiciary. The "general objective" of the Information Act, whether in the context of litigation,[7] administrative rule making,[8] or negotiations, is "to enabl[e] the public

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Nearly all agencies move so slowly and carefully in responding to a request for public records that the long delay often becomes tantamount to denial.

Dozens of agencies have set up complicated procedures for requesting public records.

Many will respond only to repeated demands for information, filed formally and in writing. Others require detailed identification of the records sought, so that only those who have complete knowledge of an agency's filing system can identify properly the records sought.

Some agencies have harassed citizens who had the temerity to press their demands for public records; others, when forced to provide copies of government documents, have given out illegible copies.

7. S. Rep. No. 813, 89th Cong. 1st Sess. (1965), p. 7, where it was noted that one purpose of the Act was to ". . . prevent a citizen from losing a controversy with an agency. . . ."

8. See *National Welfare Rights Org.* v. *Richardson* (Civ. 2178-71, D. C. D. C., March 13, 1972), discussed in *Aguayo* v. *Richardson*, 472 F. 2d 1090, 1097 n. 10 (2nd Cir. 1973); cf. *Lewis-Mota* v. *Sec. of Labor*, 469 F. 2d 480 (2nd Cir. 1972).

readily to gain access to the information necessary to deal effectively and upon equal footing with the federal agencies." S. Rep. 1219, p. 3. Accordingly, where "information is necessary for the public . . . if it is to be able to deal efficiently with its government" (S. Rep. 1219, p. 4), the courts can not, without a clear indicia of a contrary Congressional intent, be assumed to be powerless to effectuate these objectives. Cf. *Abbott Laboratories* v. *Gardner, supra.*

An examination of the full history of the Act, including the early legislative hearings, also reveals why Congress concluded that an express reference to judicial enforcement was necessary "to avoid any possible misunderstanding as to the court's powers." S. Rep. No. 1219, p. 7. The position towards the proposed bills, which eventually developed into the Act, taken uniformly by the executive agencies led by the Justice Department, was that Congress could not pass any statute that required executive agencies to produce documents without contravening the separation of powers set forth in the Constitution; a position that the bill "can result in a valid enactment only if it leaves undisturbed the inherent authority of the executive branch to govern disclosure and nondisclosure of its records."[9] It was in light of this latent constitutional confrontation, Sears suggests, that Congress felt it necessary "to make clear that the district courts shall have [the] power" (S. Rep. No. 1219, p. 7) to order disclosure and hold executive officers in contempt for non-production. To twist the statutory language, based on what is otherwise Congressional silence, would do a great disservice to the Act's salutary objective of regulating the previous abuses of the administrative agencies.

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9. Hearings, 89th Cong. (1965) at 22, and *supra* n. 1 at p. 2. See also Hearings Before the Subcommittee On Constitutional Rights of the Senate Committee on the Judiciary, 85th Cong., 2nd Sess. on S. 921 and the Power of the President to Withhold Information From Congress, March-April, 1958, which was chaired by Senator Hennings who submitted one of the original bills (S. 2148, 85th Cong.) proposing the Information Act. See S. Rep. No. 1219, p. 9.

4. The significant issue which remains for this Court to resolve is when, and under what circumstances, can a federal court invoke its historic, equitable powers to enforce the Act. In formulating such a rule three factors, it is submitted, must be considered: (1) the Act's requirement, as previously described, that production be prompt; (2) the "perishable" (H. R. Rep. No. 92-1419, p. 74) nature of the information sought; and (3) the fact that the agency has sole possession of the documents and is the only party in a position to determine the impact of a requested document in a particular case. To accommodate these factors, a demonstration of an improper withholding of public documents must constitute a *prima facie* showing of irreparable harm sufficient to merit the issuance of injunctive relief staying administrative proceedings. The existence or absence of actual injury stemming from delayed disclosure can only be demonstrated by the agency, not the private plaintiff. Accordingly, without a rebuttable presumption of injury, administrative "foot dragging" (H. R. Rep. No. 1419, p. 74) will be able to render information sought "totally useless" (*ibid.*) through untimely production. Such a *prima facie* demonstration, coupled with a strong probability of success on the merits, should, absent countervailing equities, require issuance of an injunction.

Naturally, even assuming a *prima facie* case is established under the proposed rule, a traditional balancing of equities would be required. A court would consider whether other private parties would be adversely affected by a delay in the administrative proceeding, whether the plaintiff is seeking to avoid the application of law enforcement process to himself or whether the agency could demonstrate some special consideration which would render a stay unjust.[10] In the absence of all of these

10. Although Sears, as an *amicus curiae*, does not seek herein to apply the facts of the instant case to the proposed rule, it must be noted that the government has raised only a single countervailing factor that might preclude the issuance of an injunction: the interest lost to the government on any liability that might be found. Assuming

countervailing factors, an injunction to stay administrative proceedings can have only one effect—to encourage the Congressional objectives of the Information Act.

CONCLUSION

For each of the foregoing reasons, it is respectfully requested that the decision of the District of Columbia Court of Appeals be affirmed.

Respectfully submitted,

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arguendo such a consideration might be sufficient to bar the issuance of an injunction, it must be noted that any injunction could be conditioned so as to minimize the impact of such a factor. For example, a court could, as a condition of issuing its injunction, require that the plaintiff accept a retroactive liability on the accrual of interest for some portion of the time lost during the production and utilization of the withheld documents. More importantly, however, it must be remembered, that the Information Act is new law. As elucidating court decisions construing the various portions of the Act issue, delay caused by uncertainty over the Act's requirements will correspondingly diminish.